IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

WEDNESDAY, THE 31ST JANUARY 2007 / 11TH MAGHA 1928

RSA.No. 52 of 2007(F)

AS.75/2006 of II ADDL. DISTRICT COURT, TRIVANDRUM
OS.1460/2003 of III ADDL.M.C.,TRIVANDRUM

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: APPELLANTS/APPELLANTS/DEFENDANTS 1 TO 4.

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1. STEPHEN F.ROZARIO,
   S/O.FRANCIS ROZARIO, SOSAMMA COTTAGE,
   T.C.NO.34/1613, KOCHUTHOPPU, VALLAKKADAVU,
   THIRUVANANTHAPURAM.

2. AJI STEPHEN,
   W/O.STEPHEN ROZARIO, RESIDING AT DO. DO.

3. FRANCIS ROZARIO,
   S/O.SEBASTIAN ROZARIO,
   RESIDING AT DO. DO.

4. POULIN FRANCIS,
   W/O.FRANCIS ROZARIO,
   RESIDING AT DO. DO.

BY ADV. SRI.C.K.MOHANNAN

RESPONDENTS: RESPONDENTS/PLAINTIFFS & ADDL.DEFENDANTS 5 & 6

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1. EALIAMMA PEREIRA,
   RESIDING AT 13, JALAN GRISEK, SINGAPORE-419 448,
   FROM MOLLY COTTAGE, T.C.NO.45/36,
   CHERIYATHURA, VALLAKKADAVU P.O.,
   THIRUVANANTHAPURAM, REPRESENTED BY HER POWER OF
   ATTORNEY THE 2ND RESPONDENT.

2. PEREIRA NAZARETH ZAVIER,
   MOLLY COTTAGE, T.C.NO. 45/36, CHERIYATHURA,
   VALLAKKADAVU P.O., THIRUVANANTHAPURAM.

3. KOCHUTHOPPU-SANKUMUGAM MATSYA THOZHILALI
VIKASANA SAMRAKSHANA SANGHOM,
T.C.NO.34/1613, KOCHUTHOPPU,
VALLAKKADAVU, THIRUVANANTHAPURAM.

4. KOCHUTHOPPU RESIDENCE ASSOCIATION
T.C.NO.34/1613, KOCHUTHOPPU,
VALLAKKADAVU, THIRUVANANTHAPURAM.

BY ADV. SRI.K.B.PRADEEP(CAVEATOR)

THIS REGULAR SECOND APPEAL HAVING COME UP FOR ADMISSION ON 31/01/2007, ALONG WITH RSA NO. 92 OF 2007 THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

Order on I.A.No.70/07 in R.S.A. No.52/07

31.1.07	Dismissed	Sd/- M.Sasidharan Nambiar Judge

M.SASIDHARAN NAMBIAR,J.

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R.S.A. NO.52/07 & 92/07

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Dated this the 31st day of January 2007

JUDGMENT

Appellant in R.S.A.92/07 is the first appellant in R.S.A.52/07. Respondent in R.S.A.92/07 is the first respondent in R.S.A.52/07. R.S.A.92/07 is filed challenging the decree and judgment in A.S.172/04 which was jointly disposed along with A.S.75/06 by Additional District Judge, Thiruvananthapuram. R.S.A.52/07 is filed challenging the decree and judgment in A.S.75/06. A.S.75/06 was filed challenging the decree and judgment in O.S.1460/03 and A.S.172/04 was filed challenging the decree and judgment in O.S.1744/06. The appellant in R.S.A.92/07 filed O.S.1744/00 seeking a decree for declaration of title and possession of the appellant over the plaint schedule property. Plaint schedule property in both the suits is the same, 17 cents of property in survey No.1818/2 in Pettah Village of

Thiruvananthapuram Taluk, including the building bearing TC 78/1313. The title set up by the appellant in O.S.1744/00 is possessory title perfected by adverse possession. It was contended by the appellant that the plaint schedule property which admittedly originally belonged to Catherine Rozario, his grandmother, was left abandoned after she migrated to Singapore and in 1982 appellant trespassed into the plaint schedule property constructed the building and started residing therein and since then he has been in possession of the property adverse to the true owner and he thereby perfected his title. Respondent in R.S.A.92/07 who is the first respondent in R.S.A.52/07 filed a written statement disputing the plaint claim and contended that the property belongs to her as per registered sale deed 3148/66 of SRO, Thiruvananthapuram (marked Ext.A2 in O.S.1460/03) and it was never an abandoned property. It was admitted that the property

originally belonged to Catherine Rozario. Respondent and third appellant in R.S.A.52/07, the father of the appellant, are the children of Catherine Rozario. She also contended that when their mother went to Singapore respondent permitted the father of the appellant (third appellant in R.S.A.52/07) to reside as a tenant in the building in the plaint schedule property. Learned Munsiff framed necessary issues. On the evidence of Pws.1 to 4 and Exts.A1 to A18, Dws 1 and 2 and Exts.B1 to B7 and Exts.X1 to X5(a) learned Munsiff found that appellant failed to establish the title and title vests with the respondent and dismissed the suit as per judgment dated 9.1.03. After dismissal of the suit, respondents in A.S.52/07 filed O.S.1460/03 before the same court seeking a decree for permanent prohibitory injunction restraining appellants in R.S.A.52/07 from trespassing into the plaint schedule property. The suit was subsequently got amended seeking recovery of

possession on the strength of title. Appellants filed a joint written statement in that suit contending that plaint schedule property originally belonged to Catherine Rozario and plaintiffs managed to get the sale deed executed fraudulently and respondents are foreign citizens and they have no right to acquire immovable property in India without the previous permission of Reserve Bank of India and third appellant had never sought any financial assistance from respondents and Catherine Rozario who is the mother is real owner of the plaint schedule property and appellants alone have right over the plaint schedule property and sale deed 3148/66 is a bogus document and for more than 50 years third appellant with his wife and children are residing in the building situated in the plaint schedule property and first appellant is permanently residing in the plaint schedule property eversince his birth and respondents are not in possession of the property and they are not

entitled to the decree for injunction sought for. After the amendment of the plaint, additional written statement was filed contending that the injunction application was dismissed by the court finding that respondents are not in possession of the property and respondents even thereafter did not admit possession of the property by appellants and they are not entitled to the decree for recovery of possession. Learned Munsiff on the evidence of Pw.1 and DW1 and Exts.A1 to A12 and B1 to B17, as per judgment dated 27.9.05 granted a decree directing appellants to surrender possession of the plaint schedule properties including the building to the first respondent. Challenging the said judgment A.S.75/06 was filed. Challenging the dismissal of O.S.1744/00 A.S.172/04 was filed. Learned Additional District Judge heard both the appeals together and as per common judgment dated 18.12.06 dismissed the appeals confirming decree of the trial court. These appeals are filed

challenging the concurrent decree and judgment passed by the learned Munsiff as confirmed by learned Additional District Judge.

2. Learned counsel appearing for appellants was heard.

3. The argument of learned counsel appearing for appellants is that trial court in O.S. 1744/00 found that appellant's father is in possession of the property though appellant failed to establish his title perfected by adverse possession and in the written statement filed in O.S.1744/00 it has been admitted by the respondent that third appellant is the tenant of the property and therefore civil court has no jurisdiction to grant a decree for recovery of possession and an order of eviction against a tenant could be granted only as provided under section 11 of Kerala Act 2 of 1965. It was also argued that in O.S.1460/03 respondents have no case that the tenancy created in favour of third appellant was either surrendered

or abandoned or terminated and therefore third appellant continues to be a tenant as admitted in O.S.1744/00 and therefore the decree granted for recovery of possession is illegal and unsustainable. Relying on the decision of the Apex Court in **Kiran Singh v. Chaman Paswan (A.I.R. 1954 SC 340)** it was argued that when the third appellant is admitted to be a tenant by the respondent the decree for recovery of possession granted by the civil court is a nullity and for that reason the judgment in O.S. 1460/03 as confirmed in A.S.75/06 is to be set aside. Learned counsel relied on the decision of this court in **Ramankutty v. Mary Ponnammal Pereira (1978 KLT 880)** and in **Ibrayan v. Balan (1985 KLT 896)** and the decision of the Apex Court in **Deva Sahayam v. P. Savithramma (AIR 2006 SC 779)** argued that civil court cannot grant a decree for recovery of possession, when third appellant is a tenant of the first respondent as admitted in O.S.1744/00.

4. O.S.1744/00 was filed by the appellant in R.S.A.92/07 seeking a decree for declaration of his title. The title set up is a title perfected by adverse possession. What was contended by the appellant was that the plaint schedule property which originally belonged to his grandmother was abandoned and in 1980 it was trespassed and reduced to his possession by the appellant and since then he has been in possession of that property adverse to the true owner and thereby he has perfected his title. The very same appellant has filed a joint written statement along with his father in O.S. 1460/03. What was contended in the written statement was that plaint schedule property therein, which is the same plaint schedule property over which appellant set up title by adverse possession, has been in the possession of third appellant. It was also contended that only the appellants (and not first appellant alone) have right over the plaint schedule property. It was

also contended that first appellant was born in that building and eversince his birth he has been in possession of the said property and not that first appellant trespassed into the property and constructed the building after 1980. That contention itself is sufficient to non-suit the appellant in O.S.1744/00. What was contended in that suit was that the property which originally belonged to grandmother was abandoned and appellant trespassed into that property and reduced into his possession and since then he has been in possession of that property adverse to all others and has been in possession of the same as true owner. That case is contradictory to the case pleaded in the written statement filed in O.S.1460/03. The contention in the written statement shows that the building was never abandoned and therefore there is no question of trespass in 1980 as set up in O.S.1744/00. Learned Munsiff and learned Sub Judge rightly appreciated the evidence and non-suited

the plaintiff in O.S.1744/00. I do not find any substantial question of law involved in that case. Therefore R.S.A. 92/07 is only to be dismissed.

5. Though O.S.1460/03 was originally filed as a suit for injunction, the suit was amended and after the amendment the suit is one for recovery of possession on the strength of title. It was contended by respondents in R.S.A.52/07 that plaint schedule property which originally belonged to the mother of, first respondent and third appellant, was assigned to him as per Ext.A2 sale deed and thereby she has title to the plaint schedule property. Though the title was disputed by appellants contending that the sale deed was obtained fraudulently and first respondent being a foreign citizen is not competent to purchase the property, no evidence was adduced to prove that there was any fraud or that at the time of execution of Ext.A2, first respondent was a foreign citizen. The trial court and appellate court on

the evidence found that Ext.A2 sale deed is not vitiated and the title vest with first respondent. These findings were not challenged by the learned counsel. The finding is perfectly in accordance with the evidence on record.

6. Then the question is whether first appellant is entitled to the decree for recovery of possession? The argument of learned counsel appearing for appellants is that in view of the admission of first respondent in the written statement in O.S.1744/00, it is to be taken that third appellant is the tenant of the building and therefore without recourse to the Kerala Buildings (Lease and Rent Control) Act (Act 2 of 1965) a suit for recovery of possession is not sustainable. It is to strengthen the argument reliance was placed on the decision in **Ramankutty's case (supra)and Ibrayan's case (supra) and also in Deva Sahayam's case (supra).** Facts of those cases are entirely different. In **Ibrayan's case** one

Krishnan Nair and others filed a petition for eviction under Kerala Buildings (Lease and Rent Control) Act. In the written objection filed before the Rent Control Court the so called tenants denied the title of the landlord. The Rent Control Court found that denial of title was bona fide and directed petitioners to file a suit for eviction before the civil court. A suit for eviction was thereafter filed on the strength of title. The trial court found that lease of the building as alleged in the plaint is not true and first plaintiff has title to the plaint schedule building. Holding that when there is a dispute as to who is the landlord of the building, there cannot be a tenant landlord relationship, trial court granted eviction holding that the grounds for eviction as provided under the Rent Control Act need not be proved. It was challenged in appeal. The first appellate court confirmed the judgment. It was challenged before this court. This court

holding that Rent Control legislation is a complete code in itself held that S.111(g) of the Transfer of Property Act cannot be invoked to turn the tables on the tenants, because there will be no forfeiture of the lease to make the tenant liable to be thrown out as he can take shelter under Kerala Act 2 of 1965. In **Ramankutty's case(supra)** also the fact that the defendant was a tenant was not disputed. When the decree for recovery of possession was executed, judgment debtor contended that he can be evicted only as provided under Kerala Act 2 of 1965. In the objection filed by the decree holder also it was admitted that the building was let out to the judgment debtor. On those facts it was held that when the Rent Control Act is applicable to the area, a tenant could be evicted only as provided under section 11 of Kerala Buildings (Lease and Rent Control) Act and therefore in execution of the decree granted by civil court, judgment debtor cannot be evicted. In

Deva Sahayam's case (supra) also it was held civil court has no jurisdiction to grant a decree for recovery of possession of a tenant entitled to the protection under the Rent Control Act. It was held:-

> "It is now well-settled that a decree passed by a court having no jurisdiction is a nullity. The Civil Court had no jurisdiction to pass a decree for eviction only on the basis that the tenant has denied their title. The matter might have been different if the civil court has otherwise jurisdiction to entertain a suit. The legislature has created new rights and

liabilities for both the landlord and tenant in terms of the provisions of the said Act and provided a forum therefor. The jurisdiction of the civil court having been barred except in a situation where the proviso appended to sub-section (1) of Section 10 would be attracted, the Civil Court has no jurisdiction to entertain a suit for eviction on a ground envisaged under section 10 (2) (vi) of the A.P. Buildings(Lease, Rent and Eviction) Control Act. The Civil Court, thus, had

> no jurisdiction to entertain the counter-claim."

In that case in the written statement, landlord categorically stated that plaintiff has been in possession of the building as a tenant and continues to be a tenant. It was contended that plaintiff has denied the title of the landlord and so civil court has jurisdiction. It was held that defendant having admitted that tenancy subsists, can evict plaintiff only as provided under the Rent Control Act.

7.The question is whether on the facts of this case the principles relied on by the learned counsel appearing for appellants applies?

8. The contention raised in written statement filed in O.S.1744/00 reads:-

> "When my mother went to Singapore, myself permitted my brother

> ie.the father of the plaintiff to reside as a tenant in the plaint schedule building. The plaint schedule property and building was never in an abandoned stage as claimed by plaintiff."

9. When O.s.1460/03 was amended and a decree for recovery of possession was sought on the strength of title,contending that appellants are trespassers and have no right over the property, appellants did not raise a contention that third appellant is a tenant of the building or the plaint schedule property. There is no admission in the written statement filed in O.S.1744/00 that third appellant is a building tenant coming within the ambit of Kerala Act 2 of 1965. Appellants in the written statement did not raise a contention that they or any of them are entitled to the protection

provided under Kerala Act 2 of 1965. So long as appellants have no case that third appellant is a tenant, I do not find any reason to hold that civil court has no jurisdiction to grant a decree for recovery of possession or that the decree for recovery of possession granted is a nullity.

10. The right of appeal is neither a natural nor an inherent right attached to the litigation. Being a substantive statutory right, it has to be relegated in accordance with law in force at the relevant time. The conditions mentioned in section 100 of Code of Civil Procedure must be strictly fulfilled before a Second Appeal can be maintained. No court has power to add or to enlarge these grounds. Concurrent findings cannot be disturbed on equitable grounds. The principles relating to Section 100 of the Code was summarised by their Lordships of the Apex Court in **Hero Vinoth v. Seshammal (2006 AIR SCW 2833)** as follows:-

"(i) An inference of fact

from the recitals or contents of a document is a question of fact. But the legal effect of the terms of a document is a question of law. Construction of a document involving the application of any principle of law, is also a question of law. Therefore, when there is misconstruction of a document or wrong application of a principle of law in construing a document, it gives rise to a question of law.

(ii) The High Court should

be satisfied that the case involves a substantial question of law, and not a mere question of law. A question of law having a material bearing on the decision of the case (that is, a question, answer to which affects the rights of parties to the suit) will be a substantial question of law, if it is not covered by any specific provisions of law or settled legal principle emerging from binding precedents, and, involves a debatable legal issue.

A substantial question of law will also arise in a contrary situation, where the legal position is clear, either on account of express provisions of law or binding precedents, but the court below has decided the matter, either ignoring or acting contrary to such legal principle. In the second type of cases, the substantial question of law arises not because the law is still debatable, but because the decision rendered on a material question, violates the settled

position of law.

(iii) The general rule is that High Court will not interfere with concurrent findings of the Courts below. But it is not an absolute rule. Some of the well recognized exceptions are where (i) the courts below have ignored material evidence or acted on no evidence; (ii) the courts have drawn wrong inferences from proved facts by applying the law erroneously; or (iii) the courts have wrongly cast the burden of proof. When we refer to 'decision based on no evidence', it

> not only refers to cases where there is a total dearth of evidence, but also refers to any case, where the evidence, taken as a whole, is not reasonably capable of supporting the finding."

When it is found that, where the facts required for a point of law have not been pleaded, a litigant should not be allowed to raise that question as a substantial question of law in second appeal. Appellants in the written statement or additional written statement did not raise a plea that they or third appellant is a building tenant and can be evicted only as provided under Kerala Act 2 of 1965 and hence civil court has no jurisdiction to grant a decree for recovery of possession. Even before the first appellate court there was no such case. There was no case before the trial court or first appellate court that first

respondent pleaded in the other suit that third appellant is a tenant and so suit for recovery of possession is not maintainable. Hence without the factual foundation and plea appellants are not entitled to contend it as a substantial question of law. No substantial question of law arises in R.S.A. 52/07 also. When the suit is for recovery of possession on the strength of title and the title is found with the first appellant, unless the title is barred by adverse possession or appellants are protected by any of the legislation from eviction, first respondent is entitled to the decree for recovery of possession on the strength of her title. Appellants did not establish any such right. Therefore I find no merit in both the appeals. Both the appeals are dismissed in limine.

M.SASIDHARAN NAMBIAR
JUDGE

M.SASIDHARAN NAMBIAR, J.

W.P.(C).NO. /06

JUDGMENT

SEPTEMBER,2006